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No. 1169

In the

Supreme Court of the United States

OCTOBER TERM, 1965

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners-Appellants Below,

vs.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO, Rockford, Illinois, Winnebago County, et al.,

Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NORMAN MILLER
EARL G. SCHNEIDER
MICHAEL R. GALASSO
One E. Wacker Drive
Chicago, Illinois 60601
Attorneys for Petitioners

MILLER, SCHNEIDER & GALASSO
Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners-Appellants Below,

vs.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO, Rockford, Illinois, Winnebago County, et al.,

Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Suburban Tile Center, Inc., and United Construction and Trades Union, Local #102, respectfully pray for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on November 30th, 1965.

OPINION BELOW

The United States District Court for the Northern District of Illinois, Eastern Division, sustained the motions of the respective Respondents-Defendants, hereinafter referred to a "Respondents", to dismiss the Petitioners' Complaint, as amended, and dismissed said cause with prejudice. Said Complaint appears at pages 6 through 39 of the Joint Appendix, (JA 6-39), and the amendment to said Complaint appears at (JA 68-71). The Respondents' respective motions to dismiss appear at (JA 75-79).

(A copy of the order of the District Court, dismissing said cause with prejudice, appears at (JA 81).)

The United States Court of Appeals for the Seventh Circuit, affirmed the judgment of the District Court, (App. P. 1a). The decision of the United States Court of Appeals for the Seventh Circuit is reported at 354 F.2d 1, 7 Cir., (1965).

JURISDICTION

The judgment of the Court of Appeals was entered on November 30th, 1965. Rehearing was denied on January 4th, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1); and 28 U.S.C. 2106.

QUESTIONS PRESENTED FOR REVIEW

1. Does the construction industry proviso of 29 U.S.C., Section 158(e), immunize an agreement from the scope of the anti-trust laws, wherein:

   (a) An employer's association, (multi-employers), contracts, on behalf of its respective members, who comprise the majority of the local employers in the construction business and allied industries in Winnebago County, Illinois, with

(b) the representative, (Rockford Trades Council), of twenty (20) or so, antonomous, local Winnebago County unions, whose individual members are employed by the multi-employers, whereby said contracting parties:

(1) mutually agree to simultaneously impose and enforce, by economic coercion, if required, a boycott and "hot cargo" restriction, operative throughout the County of Winnebago, Illinois, (protected area), shop and construction site alike, upon all competing employers, (unrecognized employers), who do not enter into collective bargaining agreements with either the Rockford Trades Council, and/or its local member unions, having jurisdiction over the employer's particular field of endeavor.

(2) intend by their restrictive pact, to eliminate competition within the protected area from any and all unrecognized employers.

2. Does the Construction Industry Proviso override Your Honors' decision in the "Sand Door" case, *United Brotherhood of Carpenters and Joiners, et al.* v. *N.L.R.B.*, 357 U.S. 93, (1958), in that said legislation authorized labor's utilization of economic coercion to enforce the provisions of a construction site, hot cargo, and/or secondary boycott clause, contained in a collective bargaining agreement?

STATUTORY AND CONSTITUTIONAL LAW INVOLVED

29 U.S.C., Section 158(e)

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease

or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .*" (Emphasis added to set out construction industry proviso)

29 U.S.C., Section 157

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

15 U.S.C., Section 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."

15 U.S.C., Section 2

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of

trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor. . . ."

29 U.S.C., Section 158(b)

"It shall be an unfair labor practice for a labor organization or its agents . . .

(4)(i) "to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work of any goods, articles, materials, or commodities or to perform services of

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

A. "forcing or requiring any employer or self-employed person to join any labor or employer organizations or to enter into any agreement which is prohibited by section 8(e).

B. "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . .

D. "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade,

craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

STATEMENT OF CASE

Your Petitioners instituted the case at bar by filing their Complaint, containing three (3) counts, in the District Court for the Northern District of Illinois, Eastern Division.

In the first count, the Petitioner, Suburban Tile Center, Inc., (Suburban Tile), alleged that the Respondents entered into a combination to suppress competition among trade, craft, and/or construction contractors, and/or sub-contractors, and/or among trade, and/or craft, and/or construction unions, resulting in an unreasonable restraint upon trade, in violation of the Sherman Act. (Title 15 U.S.C., Section 1 and Section 2.)

Said count further alleged that said unreasonable restraint upon trade, resulted in injury to the public, from the lessening of competition, and specific damages to Petitioners. (JA 23)

The first count appears at (JA 6-25); and the amendment thereto appears at (JA 68-70).

The second count was initiated by the Petitioner, Suburban Tile, to recover for damages resulting from alleged economic coercion, constituting unfair labor practices, perpetrated by the Respondent Unions, in violation of the Labor-Management Relations Act, Title 29 U.S.C., Section 158(b), as authorized by Title 29 U.S.C.A., Section 187(b).

The third count is by the Petitioner, United Construction And Trades Union, Local #102, (Local #102), seeking to enjoin the continuation of said allegedly monopolistic contract, (restrictive pact), and for damages, as provided by the anti-trust laws, which it sustained by reason that its membership cannot obtain employment within the restricted area of Winnebago County, Illinois.

The essential facts are as follows:

On November 9th, 1962, the Respondent, Suarez Brothers Construction Co., Inc., (Suarez Brothers), a general contractor and the developer of the Presidential Courts Project, a thirty-eight (38) apartment building project, containing five hundred thirty-eight (538) apartments, to be constructed west of the Machesney Airport, Rockford, Illinois, entered into a written contract, (JA 52), with the Respondent, Rockford Building and Construction Trades Council of Rockford, Illinois, Winnebago County, (which association consists of the representatives from approximately twenty (20) antonomous local area unions), hereinafter referred to as the "Rockford Trades Council".

Under the terms of said contract, Suarez Brothers agreed that "effective in all places where work is being performed, or to be performed, by . . . (Suarez Brothers)", and to include "all work by the various craft unions associated with the . . . (Rockford Trades Council) and within the territorial jurisdiction of said . . . (Rockford Trades Council), (JA 17, 18, 19), Suarez Brothers shall ". . . not do or sublet any work commonly done by the various craft unions, who are members of the . . . (Rockford Trades Council) to any person, firm, corporation or association not having a collective

bargaining agreement with the . . . (Rockford Trades Council) or the local craft unions associated with the . . . (Rockford Trades Council), which commonly has jurisdiction over the class of work."

About April of 1963, but in any event, prior to June 21st, 1963, the Respondent, Building Contractors Association of Rockford, Inc., (multi-employers), on behalf of its members, who comprise the major employers engaged both in the construction field, and in industries that render services for, and/or supply prefabricated products to, said construction employers, general contractors as well as subcontractors within the political subdivision of Winnebago County, Illinois, entered into an agreement, (restrictive pact), with the Rockford Trades Council, wherein said multi-employers agreed:

> "IV . . . effective in all places where any work is performed or to be performed . . . within the territorial jurisdiction of the Employer and each craft union affiliated with the . . . (Rockford Trades Council).
>
> V . . . not to sublet any work commonly done by the various craft unions who are members of the . . . (Rockford Trades Council), to any person, firm, corporation or association not having a collective bargaining agreement with the . . . (Rockford Trades Council) or the local craft union affiliated with the . . . (Rockford Trades Council) which commonly has jurisdiction over the class of work. It is further agreed that no journeyman or apprentice shall be required to work on any projects where other than craft union personnel affiliated with the aforesaid Council are employed.
>
> VI . . . that only contractors having contracts with the . . . (Rockford Trades Council) and its associate local unions will be used in the construction of its

projects erected within the common jurisdiction of the parties hereto.

Any Contractor not a member of any employer Association, may receive the benefits and assume the obligations of this Agreement by and with the Council by signing an exact copy of this Agreement." (JA 68-70).

The contract that appears at (JA 55) is an exact duplicate of the multi-employers agreement with the Rockford Trades Council, save for the insertion of the name, Suarez Brothers Construction Company, Inc., thereon.

On or about May 6th, 1963, the Petitioner, Suburban Tile, an Illinois corporation, with offices in Cook County, Illinois, and whose principal operations were within the Cook County area, entered into a sub-contract with Suarez Brothers to sell and install prefabricated tile, to be utilized in the Presidential Courts Project. (JA 12) All of Suburban Tile's employees were union members, the majority of whom belonged to Local #102. Suburban Tile did not have a collective bargaining agreement with the Rockford Trades Council, or with any local union affiliated with the Council. (JA 20).

On May 9th, 1963, Suburban Tile commenced the performance of its sub-contract with Suarez Brothers, (JA 12); shortly thereafter, the Rockford Trades Council ascertained that Suburban Tile's employees were not members of its local affiliated unions, and advised them they would not be allowed to work there. (JA 20)

Suburban Tile met with the Rockford Trades Council, on or about May 22nd, 1963; and because it did not meet the terms of the restrictive pact, it was informed

that it would not be permitted to perform its sub-contract with Suarez Brothers. (JA 21)

From time to time thereafter, prior to June 21st, 1963, the Rockford Trades Council, and the affiliated local unions, informed Suarez Brothers that Suburban Tile had not signed the restrictive pact, and threatened "to cause work stoppages, picketing, boycotts, and sue in the Federal Court for damages if . . . (Suburban Tile) . . . was not put off the job; . . . the Rockford Trades Council notified certain affiliated unions to walk off the Presidential Courts construction site unless and until . . . (Suburban Tile) contract was terminated, and pursuant therewith, certain affiliated unions and members thereof, did, in fact, cease working thereon." (JA 21)

On or about June 21st, 1963, Suarez Brothers signed an exact copy of the restrictive agreement that theretofore had existed by and between the multi-employers and the Rockford Trades Council, (JA 68, 69), thereby becoming a party to the alleged unlawful conspiracy. (JA 56, 58)

The occupations of the members of the local unions affiliated with Rockford Trades Council, are not limited exclusively to work to be performed at a construction site. (JA 9) Accordingly, said employees may work just as readily in a factory or shop, assembling finished and/or prefabricated products to be utilized ultimately at a construction site; and/or, as in the case of an affiliated truck drivers union, may deliver products to a construction site.

On June 28th, 1963, one week after Suarez Brothers had signed the restrictive pact, an uncontested, permanent injunction was entered in an action, initiated on June 26th, 1963, between the Rockford Trades Council, et al.

and Suarez Brothers, by the Circuit Court of Winnebago County, (JA 21, 22) perpetually restraining Suarez Brothers from hiring or sub-letting work to any person, firm, corporation, or association not having a collective bargaining agreement with the Rockford Trades Council or its affiliated local unions. (JA 59, 60). Suburban Tile was not made a party to said proceeding.

On June 29th, 1963, Suarez Brothers, by letter, directed Suburban Tile to stop doing the tile work on the Presidential Courts project. (JA 39)

Thereafter, proceedings were entertained by the National Labor Relations Board, (N.L.R.B.), in case No. 13-CC-374, concerning the foregoing matters. (JA 70-71).

On March 6th, 1964, a "settlement agreement", (JA 72-74), was effected by the N.L.R.B., nullifying the restrictive provisions, complained of in Suarez Brothers' contracts with the Rockford Trades Council, namely, provisions No. 3, 4, 5, and 6, of the agreement of November 9th, 1962, (JA 17, 18), and Articles IV, V, and VI, of the restrictive pact, a copy of which Suarez Brothers signed on June 21st, 1963. (JA 56, 57).

The settlement agreement, which provides, (JA 72), that it does not constitute an admission that an unfair labor practice has occurred, was never signed by Suburban Tile, the charging party, and only applied to said contracts signed by Suarez Brothers, rather than the multi-employers, whose contract with the Rockford Trades Council continued in force.

BASIS FOR FEDERAL JURISDICTION

The jurisdiction of the Federal Court in this matter is authorized pursuant with Title 15 U.S.C., Section 15, 38 Stat. 731, specifically providing for actions by persons injured by reason of anything forbidden in the anti-trust laws; and by Title 29 U.S.C., Section 187(a)(b), as amended September 14th, 1959, Pub. L. 86-257, Title VII, Section 704(e), 73 Stat. 545, specifically providing that an action may be commenced by anyone injured in his business by reason of the commission of an unfair labor practice by a labor organization, in violation of Section 158(b)(4). (Title 29 U.S.C. 158(b)(4).

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Court below turned Congress' endeavor to further the rights of a laborer employed to toil at "the site of the construction, alteration, painting, or repair of a building, structure, or other work", 29 U.S.C., Section 158(e), (construction site proviso), into an awesome legalized obstruction upon the free flow of interstate commerce, resulting in disastrous ramifications upon our economy.

In its determination, the United States Court of Appeals for the Seventh Circuit, 354 F.2d 1, in the case at bar, was required to make a judicial interpretation of first impression, that is of major importance to the construction industry, relating to the territorial scope and contracting parties within the embrace of the legalized secondary boycott permitted by the construction site proviso. (PB 3, 4)

By doing violence to the rules of construction, as well as to the unambiguous wording of the construction site proviso, the Court of Appeals stretched "the site of the construction, alteration, painting, or repairing of *a building, structure or other work*", to include the entire protected area of Winnebago County, Illinois, shop, construction site, and/or any points betwixt and between, as well as permitting the multi-employers, to

squeeze into a *singular* "employer engaged in the construction industry."

> "A proviso which follows and restricts an enacting clause general in its scope should be strictly, but reasonably construed, so as to take out of the enacting clause only those acts which are fair within the terms of the proviso, and the burden of proof is one claiming . . . the benefit of the proviso." 28 C.J.S., Section 381, Page 886

Without quarreling with the obvious obstruction upon interstate commerce, occasioned by the conspirators' pact, the Court of Appeals took the position that it was powerless to deal with the same, inasmuch as Congress sanctioned the area-wide encumbrance upon the right of a trader's access to the markets of Winnebago County, Illinois, as imposed by the local industry herein, by the enactment of the construction site proviso, thereby removing the conspirators from the purview of the anti-trust laws.

The N.L.R.B. did not even consider the particular construction site issues involved herein, in Los Angeles Building and Construction Trades Council, et al., (1965), 151 N.L.R.B. No. 83, 58 L.R.R.M. 1490, relied upon by the Court of Appeals in its decision, 354 F 2d 1, 3, as approving agreements of the type involved in the case at bar, "even when not specifically limited to a particular construction site." Further, there was no multi-employer association, that represented the majority of the construction industry in a political subdivision of a state, involved as a party signatory to an area-wide secondary boycott agreement therein.

Alongside of its alleged shield, the construction site proviso, the Rockford Trade Council, et al., at page 31 of their Appellee's Brief, openly thrust forth the sabor-

toothed objective of the conspirators, namely, precluding so-called *"substandard employers from undercutting contractors with whom they have union contracts."*

Needless to say, all unrecognized employers, regardless of the welfare of their employees, automatically qualify under the terms of the restrictive pact, as sub-standard employers.

If the multi-employers unilaterally banded together for the purpose of boycotting unrecognized employers, Your Honors would unhesitatingly concur that theirs was a combination designed to suppress competition, resulting in an unreasonable restraint upon trade, in violation of the anti-trust laws.

Since this Honorable Court decided the landmark case of *Allen Bradley* v. *Local Union #3,* 325 U.S. 797, 89 L ed 1939, 65 S Ct. 1533, the participation of the local labor force cannot alter the substance of the violation.

In said cause, at 325 U.S. 798, 808, this Court held:

> ". . . It is a violation of the Sherman Anti-Trust Act for labor unions and the members, prompted by a desire to get and hold jobs for themselves at good wages and high working standards, to combine with employers and manufacturers of goods to restrain competition in, and to monopolize the marketing of goods.
>
> "Congress never intended that unions could, consistently with the Sherman Act, eliminate 'non-labor' groups to create business monopolies and to control the marketing of goods and services."

The Allen Bradley decision has been followed by this Court in numerous decisions. See *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 400, 411; *United*

States v. *Women's Sportswear Assn.*, 336 U.S. 460, 464; *Giboney* v. *Empire Storage*, 336 U.S. 490, 497; *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, 190; *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296; *Meat Drivers* v. *United States*, 371 U.S. 94, 99-101.

The Court below, somewhat naively, indicates that the monopoly of the local magnates is not impregnable, and hence, Allan Bradley is not applicable, inasmuch as any employer can theoretically work within the protected area of Winnebago County, Illinois, by signing a copy of the restrictive pact. However, before the closed markets become accessible to an unrecognized employer, he must see to it that his employees, who, for the most part, are skilled craftsmen, rather than itinerant unskilled laborers, change their union affiliation, and/or, if he is unsuccessful therein, replace them; of course, this he cannot do, by reason of Title 29 U.S.C., Section 157. (PB 4).

Although Suburban Tile cannot exercise or participate in the selection of an union for its employees, nevertheless, if the employees make the "wrong" choice, it can be prevented from working within a protected area. It would appear that Congress has certainly deprived Suburban Tile of its property rights, in violation of the Fifth Amendment to the United States Constitution, if the restrictive pact is found to be legalized by the construction site proviso.

From a practical standpoint, an employer who performs the bulk of his work beyond the protected area, would automatically be eliminated from Winnebago County, Illinois, as his employees would be organized by the local unions active in the area of his principal endeavors.

The following conversation, recorded at Page 1672, U.S. Taft-Hartley Act Revisions, 83 Congress 1st Hearings, Appendix, between the late Senator John F. Kennedy and Richard J. Gray, President of the A.F.L.-C.I.O. Building and Construction Trades Department, reflects upon the substantial economic pressure exerted upon a sub-contractor by the Building Trades Council, at a particular construction site, even when acting without the consort of the multi-employers, since the passage of Section 8(f), 29 U.S.C., Section 158(f), (A. 8a):

> "Senator Kennedy: We are not arguing whether unions are desirable. I think that is theoretical the way the building trades are set up, but I am thinking of a case where the sub-contractor, if we change it to 7 days and there was an election and they did not want to join a union, it seems to me that the way you argue that you would really put that sub-contractor out of business, because all of the rest of the union men would refuse to work with him, and theoretically, he would be forced to have his men join the union to stay in business, so the effect is a closed shop."
>
> "Mr. Gray: That is not so. Right in this town you have non-union contractors operating. We are not as powerful as to put a man out of business."

Congress never authorized the staggering coercive economic impact of the restrictive pact, that simultaneously wires the local area doors to all construction sites and sub-contractors' shops onto the same circuit, and exposes an unaffiliated employer to grievous financial hardship by the combine's flip of the switch.

So long as the decision of the Court below stands, an absolute, artificial barrier, erected in combination by the local magnates and their labor counterparts,

will firmly stand, precluding the entry of unrecognized contractors within the protected areas as an entirety. The agreement in the case at bar could well become a pattern; and if the proviso can render a county-wide, secondary boycott, hot cargo contract, legal, it could just as readily apply beyond, should the contracting parties be so oriented.

Whether the agreed tool, used by the contracting parties to a collective bargaining agreement, to place an unreasonable commercial obstruction upon the protected area, was the indirect means of jointly agreeing that the union would impose a wage schedule upon the business competitors of the contracting employers, that they could not meet, as in the *United Mine Workers* v. *Pennington, et al.,* 381 U.S. 657, 14 L.Ed.2d 626, 85 S.Ct. 1585, or the direct means of effecting an area-wide secondary boycott to prevent, what the Rockford Trades Council, et al. referred to on Page 31 of their Appellee Brief, filed in the United States Court of Appeals, as, "sub-standard employers from undercutting contractors with whom they have union contracts," the anti-trust immunity, by reason of the union exemption, is equally waived.

It was, of course, not only the objective of the local unions, that so-called "substandard" employers be excluded; but obviously, to the interest of the multi-employers as well.

The unlawful purpose of a union to aid business groups in restraining trade and attempting to monopolize markets is not cured by any co-existing purpose to serve legitimate union ends. *Allen Bradley Co.* v. *International Brotherhood of Electrical Workers,* 325 U.S.

805, 806, 89 L ed 1939, 65 S.Ct. 1533; *United Brotherhood of Carpenters & Joiners* v. *United States,* 330 U.S. 395, 91 L ed 973, 67 S.Ct. 775; *United States* v. *Employing Plasterers Asso.,* 347 U.S. 186, 198, 98 L ed 618, 74 S.Ct. 452; *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U.S. 94, 9 L ed 2d 150, 83 S.Ct. 162.

Unions have been held to violate the Sherman Act where agreements pursuant to collective bargaining have been the means by which the conspiracy was made and effected. *Allen Bradley Co.* v. *International Brotherhood of Electrical Workers,* 325 U.S. 797, 89 L ed 1939, 65 S.Ct. 1533; *United States* v. *American Tobacco Co.,* 221 U.S. 106, 55 L ed 663, 31 S.Ct. 632; *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809, 90 L ed 1575, 66 S.Ct. 1125; *United Brotherhood of Carpenters & Joiners* v. *United States,* 330 U.S. 395, 91 L ed 973, 67 S.Ct. 775; *United States* v. *Employing Plasterers Asso.,* 347 U.S. 186, 98 L ed 618, 74 S.Ct. 452; *Local 175, Brotherhood of Electrical Workers* v. *United States,* 219 F2d 431, cert den 349 U.S. 917, 99 L ed 1250, 75 S.Ct. 606; *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U.S. 97, 9 L ed 2d 150, 83 S.Ct. 162.

The following excerpts, from this Court's recent decision, *United Mine Workers of America* v. *Pennington, et al.,* 381 U.S. 657, 14 L ed 2d 626, 85 S.Ct. 1585, are fully applicable to the conspirator's restrictive pact herein:

At 14 L ed 2d 635:

> "From the view point of anti-trust policy, moreover all such agreements between a group of employers and a union, that the union will seek specified labor standards outside of the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case."

At 14 L ed 2d 635:

> "Thus the relevant labor and anti-trust policies compel us to conclude that the alleged agreement between U.M.W. and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the anti-trust laws."

As was stated by Your Honors, in *Meat Cutters Union, et al.*, v. *Jewel Tea Company, Inc.*, 381 U.S. 676, 14 L ed 640, 649, 85 S.Ct. 1596,

> ". . . exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policies of the labor laws. Employers and unions are required to bargain about wages, hours, and working conditions and this fact weighs heavily in favor of anti-trust exemption for agreements on these subjects. But neither party need bargain about other matters. . . ."

The restrictive pact between the two representative bodies, acting on behalf of the combined local construction industry and businesses that render services for, and supply products to it, both employer and employee alike, that precluded the entry of non-local, affiliated union, employers, from the area of their mutual operations, Winnebago County, Illinois, surely cannot qualify as a mandatory bargaining subject.

The anti-competitive commercial restraint imposed by the combine, which excluded certain employers from the markets under their control, is at the core of the type of activity to which the anti-trust laws are directed.

As Mr. Justice Douglas stated in his concurring opinion, in *United Mine Workers of America* v. *Pennington, et al.*, 381 U.S. 657, 14 L ed 2d 626, 642, 85 S.Ct. 1585:

". . . Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system. If the allegations in this case are to be believed, organized labor joined hands with organized business to drive marginal operators out of existence."

"The only architect of our economic system is Congress. We are right in adhering to its philosophy of the free enterprise system as expressed in the anti-trust laws and as enforced by *Allen-Bradley* v. *Union, supra,* until the Congress delegates to big business and big labor the power to remold our economy in the manner charged here."

Neither the construction site proviso, nor the presence of the local organized labor force, as a party to the restrictive commercial agreement in the case at bar, or as the agency that successfully brought about this combination, if that be the case, since *Allen Bradley Co.* v. *Union,* 325 U.S. 797, could remove the combination from the scope of the anti-trust laws.

II.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

In *National Labor Relations Board* v. *International Brotherhood of Teamsters, et al.,* 342 F.2d 18, 21, 22, (1965), the United States Court of Appeals for the Second Circuit, contrary to the United States Court of Appeals for the Seventh Circuit, in the case at bar, held that:

"The 'construction industry' proviso to section 8(e) . . . is limited to 'work done at the site of the construction', (and) it does not sanction a 'boycott against suppliers who do not work on the job site."

> "Island Dock did not 'work on the job site', but merely made deliveries to Wikstrom at the Cementon site. This is significant because the legislative history indicates that the proviso was not intended to protect agreements relating to supplies transported to and delivered on the construction site. 1 Leg. Hist. 943 (1959). Here the act of mixing previously loaded ingredients in the ready-mix trucks once they reached the project, relied upon by Local 249 as on site work, was, . . . merely the final act of the delivery process."

The restrictive pact, upheld by the Court below on the basis of the construction site proviso, requires the multi-employers to refrain from dealing with all unrecognized employers, so long as the work is covered by the occupations of the Rockford Trades Council's local affiliates, whether it is to be performed wholly in the shop, or at the construction site.

III.

THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE DECISION OF THIS HONORABLE COURT IN UNITED BROTHERHOOD OF CARPENTERS & JOINERS, ET AL. V. N.L.R.B., (SAND DOOR & PLYWOOD CO.), 357 U.S. 93, (1958).

In Count II, Suburban Tile alleges that economic coercion was utilized by the Rockford Trades Council and its affiliated local unions, to require Suarez Brothers to comply with its contract of November 9th, 1962, with the Rockford Trades Council, and to cause Suarez Brothers to terminate its contract with Suburban Tile. (JA 21).

The Court of Appeals failed to recognize that the construction site proviso was not intended by Congress to override the holding of this Court in *United Brotherhood of Carpenters, et al.* v. *N.L.R.B.,* (Sand Door &

Plywood Co.), 357 U.S. 98, 105 (1958), to the effect that the employer was intended to have "a freedom of choice at the time the question of whether to boycott or not arises and that coercive measures could not be effected upon the employer to force him to comply with a secondary boycott provision of his contract."

As was stated by Senator Kennedy, in discussing the construction site proviso to Section 8(e), at 105 Congressional Record 16415:

> "Agreements by which a contractor in the construction industry promises not to sub-contract work on a construction site to a non-union contractor appear to be legal today. They will not be unlawful under Section 8(e) . . . since the proviso does not relate to Section 8(b)(4), strikes and picketing to force the contracts accepted by the proviso will continue to be illegal under Section 8(b)(4).
>
> "It is not intended to change the law with respect to the judicial enforcement of these contracts. . . ."

In *Building & Construction Trades Council of San Bernadino, et al.* v. *N.L.R.B.*, 328 F.2d 540, 541 (1964), the court held specifically that:

> "Economic action used to enforce a sub-contracting clause which implicitly blacklisted all non-union sub-contractors, violated Section 8 (b)4(i)(ii)(B)."

In *Essex County and Vicinity District Council of Carpenters and Millrights, et al.* v. *N.L.R.B.*, 332 F.2d 636, (1964), a strike on the part of a union *to obtain* a provision in a union agreement with an individual employer on a construction site permitting union employees to refuse to work and engage in a secondary boycott when a "non-union situation exists" was held legal. However, the Court, on page 641, went on to say that:

"We should add that such an agreement is not a defense to an unfair labor practice charge made under Section 8(b)(4)(B)."

"The building and construction industry is an 'industry effecting commerce' within the meaning of Section 142 of this Title, making it an unfair practice for a labor organization to threaten a person engaged in 'commerce or an industry affecting commerce' with an object of requiring said person to cease doing business with any other person or requiring any other employer to recognize or bargain with the labor organization." *N.L.R.B.* v. *International Union of Operating Engineers, Local 571,* C.A. Neb. 1963, 317 F.2d 638.

Clearly, such activity constituted an unfair labor practice, in violation of the Labor-Management Relations Act of 1947, as amended; and accordingly, Count II of the Plaintiff's Complaint, as amended, is certainly actionable and should not have been dismissed.

CONCLUSION

Our free enterprise system has been grossly encroached upon by the misinterpretation of the scope of the construction site proviso, by the Court below, which legalized a monopolistic combination of organized labor and organized business and granted to it absolute control over the local area construction markets.

The area-wide restrictive boycott, imposed by the multi-employers and the Rockford Trades Council, upon competing, unorganized employers, is at the core of the activity at which the anti-trust laws are aimed.

The Court of Appeals was in error when it concluded that Congress intended to sanction the conspirator's conduct and agreements, relating to work performed at the shop as well as the construction site, by the enactment of the construction site proviso.

The construction site proviso does not authorize labor's utilization of coercion (walk-offs, picketing, etc.) to enforce the provisions of a hot cargo clause, and/or a secondary boycott provision, contained in a collective bargaining agreement against the signatory employer.

For the foregoing reasons, petitioners respectfully request that this Honorable Court grant a Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

MILLER, SCHNEIDER & GALASSO
BY EARL G. SCHNEIDER
Attorneys for Petitioners

MILLER, SCHNEIDER & GALASSO
One E. Wacker Drive
Chicago 1, Illinois
Of Counsel

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 14915

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Plaintiffs-Appellants,

v.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; CLARENCE DRUGER, Individually and as President of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; GEORGE IBEN, Individually and as Vice-President of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; EARL HIRTH, Individually and as Recording Secretary of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County, a Voluntary Unincorporated Association, For and on Behalf of the Independent Trade and Craft Unions of the A.F.L.-C.I.O, affiliated with Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; and the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL #792, A.F.L.-C.I.O., of Rockford, Illinois, and the MARBLE, TILE AND TERRAZZO WORKERS, MEMBERS OF SUBORDINATE UNION #31 of Rockford, Illinois; BUILDING CONTRACTORS ASSOCIATION OF ROCKFORD, INC., a corporation, MERLE F. DRAGER, Individually and and as Secretary of Building Contractors Association of Rockford, Inc., SUAREZ BROTHERS CONSTRUCTION CO., INC., a corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 30, 1965

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

KNOCH, *Circuit Judge.* The District Court sustained the motions of the defendants-appellees to dismiss the complaint, as amended, of the plaintiffs-appellants Suburban Tile Center, Inc., a corporation, and United Construction and Trades Union, Local #102, and this appeal followed.

Plaintiff's complaint sets out three counts. The first count alleges that:

> "[T]he defendants • • • entered into a combination to suppress competition among trade, craft and/or construction contractors and/or subcontractors, and/or among trade and/or craft and/or construction unions, resulting in an unreasonable [restraint] upon trade and in violation of Sections 1 and 2 of the Sherman Act • • •."

The second count concerns plaintiff Suburban Tile Center, Inc., and alleges unfair labor practices of the defendant unions in violation of the Labor-Management Relations Act of 1947, as amended.

The third count, concerning plaintiff United Construction and Trades Union, Local #102, seeks an injunction and damages under the anti-trust laws.

Plaintiffs assert that defendant Building Contractors Association of Rockford, Inc., which represents a majority of the contractors and sub-contractors engaged in the construction industry and various allied industries in Winnebago County, Illinois, (hereinafter sometimes called the "Contractors' Association") entered into an agreement with defendant Rockford Building and Construction Trades Council of Rockford, Illinois, Winnebago County (which consists of representatives of about twenty local unions, including defendant United Brotherhood of Carpenters and Joiners of America, Local 792 of Rockford, Illinois, and the Marble, Tile and Terrazzo Workers, Members of Subordinate Union #31 of Rockford, Illinois) hereinafter sometimes called the "Trades Council."

Plaintiffs further allege that the agreement precluded the signatory contractors from contracting for work commonly done by the craft union members of the Trades Council with anyone who does not have a collective bargaining agreement with the Trades Council or the local craft union (affiliated with the Trades Council) which commonly has jurisdiction over the class of work involved. The agreement provided that any contractor who was not a member could receive the benefits and assume the obligations of the agreement by signing an exact copy of it.

The plaintiffs assert that defendant Suarez Brothers Construction Co., Inc., (hereinafter sometimes called "Suarez Bros.") became a party to the alleged unlawful conspiracy by signing what was in effect an exact duplicate of the agreement on or about June 21, 1963. There was a prior similar collective bargaining agreement entered into between Suarez Bros. and the Trades Council on November 9, 1962, with reference to "the construction of apartment buildings project, west of Machesney Airport, Rockford, Illinois."

On or about May 6, 1963, plaintiff Suburban Tile Center, Inc., with its principal offices in Cook County, Illinois, (hereinafter sometimes called "Suburban Tile") entered into an agreement with Suarez Bros. as general contractor, to sell and install prefabricated tile at an apartment building project west of the Machesney Airport, Rockford, Illinois, known as the "Presidential Courts Project."

Plaintiffs assert that because of threats of such steps as work stoppages and lawsuits, by members of the local unions affiliated with the Trades Council, Suarez Bros. entered into the above-mentioned agreement of June 21, 1963.

Thereafter, the Trades Council sought and secured a court injunction from the Circuit Court of Winnebago County, Illinois, permanently enjoining Suarez Bros. from hiring or subletting work to persons or firms having no collective bargaining agreement with the Trades Council or its union affiliates. Suarez Bros. then directed plain-

tiff Suburban Tile to cease doing the work at the Presidential Courts Project site.

As indicated above, Suburban Tile views the economic coercion of the defendant unions directed against Suarez Bros. to secure discharge of Suburban Tile as an unfair labor practice: an illegal secondary boycott. The plaintiff union asserts that its members (who are not members of local unions affiliated with the Trades Council) have been foreclosed from engaging in their lawful occupations in the County of Winnebago unless they join such local unions.

The plaintiffs characterize the basic agreement as a combination of labor and its employers which exceeds the scope of Title 29 U.S.C.A. §158(e) and thus violates the anti-trust laws.

Section 158(e) as amended in 1959 does make it an unfair labor practice for a labor organization and an employer to agree to cease doing business with another employer. But a proviso to that section specifically excludes "an agreement between a labor organization and an employer in the construction industry relating to contracting or subcontracting of work to be done at the site of the construction * * * of a building, structure or other work * * *." It thus appears that for the construction industry, Congress has approved such contracts as the one now before us.

The National Labor Relations Board has approved agreements of this type even when not specifically limited to a particular construction site. *Los Angeles Building and Construction Trades Council (Fowler-Kenworthy Electric Co., et al.)* (1965) 151 NLRB No. 83, 58 LRRM 1490.

A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. *Orange Belt District Council of Painters No. 48* v. *N.L.R.B.*, D.C. Cir., 1964, 328 F. 2d 534, 537; *Building and Construction Trades Council of San Bernardino & Riverside Counties* v. *N.L.R.B.*, D.C. Cir., 1964, 328 F. 2d 540. Economic action

to secure such agreements has been allowed. *Essex County and Vicinity District Council of Carpenters etc. v. N.L.R.B.*, 3 Cir., 1964, 332 F. 2d 636, 641; *Construction, Production & Maintenance Laborers Union, Local 383* v. *N.L.R.B.*, 9 Cir., 1963, 323 F. 2d 422, 425. In the face of these decisions, it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws.

The plaintiffs rely on *Allen Bradley* v. *Local Union #3*, 325 U.S. 797. The Court there held that complicity of a labor organization in an otherwise unlawful conspiracy in restraint of trade did not cure the illegality of the conspiracy. The plaintiffs take the position that a unilateral agreement in these same terms among the contractors alone would have constituted an unreasonable restraint of trade. They then reason that adding the trade unions as parties to that agreement would not operate to avoid violation of the anti-trust laws. Having concluded that the agreement was a restraint on trade, they argue that it was immaterial whether or not the labor unions acted in their own self interest so long as both employers and employees benefited from the restraint.

In the plaintiffs' view the contractors enjoy a benefit from these agreements in that competition from outside contractors is limited by them. However, the agreements all provide that any contractor or sub-contractor may enter into similar collective bargaining agreements. In *Allen Bradley*, a complete monopoly was achieved (325 U.S. 800); that is not the case here. On the other hand, opportunities for employment of members of non-affiliated unions are limited to the advantage of the members of the defendant unions. We believe that the plaintiffs' reliance on *Allen Bradley* is misplaced.

We consider the foregoing to be completely dispositive of this case, and we, therefore, do not reach the other contentions of the various defendants that injuries arising from compliance with an injunction cannot support recovery in a private anti-trust suit; that the plaintiff union is a voluntary unincorporated association which is not the real party in

interest and which lacks capacity to sue under the anti-trust laws; that the N.L.R.B. has exclusive jurisdiction over conduct allegedly violative of the Labor-Management Relations Act; that the plaintiffs have failed to bring the unnamed local unions affiliated with the Trades Council and their individual members before the Court by service of process; and that the complaint fails to allege facts sufficient to give fair notice of the claims against the Contractors' Association or Merle F. Drager, its secretary.

The judgment of the District Court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, January 4, 1966

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. WIN G. KNOCH, *Circuit Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

SUBURBAN TILE CENTER, INC., et al.
Plaintiffs-Appellants,

No. 14915 *vs.*

ROCKFORD BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

29 U.S.C. § 158 (f):

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159 (e) of this title. As amended Sept. 14, 1959 Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)—(c), 705(a), 73 Stat. 525, 542, 545. 29 U.S.C. § 158(f).